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APPENDIX A

MARTIN PETITIONERS

John H. Martin
Mary Anne Adams, custodian for Katherine Grace Adams
Mary Anne Adams, custodian for Mary Britt Adams
Katherine Grace Adams
Mary Anne Adams, custodian for Charles T. Adams
Mary Anne Adams, custodian for Richard Adams, Jr.
Mary Britt Adams
Richard M. Adams, Jr.
Charles T. Adams
Edmond R. Agee
Judith Lee Aland
Leonore Aland
Herman G. Alexander and Elaine Alexander, as joint tenants
Pearl Godfrey Alexander and J. Terry Noland, Co-Executors of the Estate of George B. Alexander, Deceased
ALFA, a corporation
Martha S. Allgood
Charles D. Allgood, II
Charles L. Allgood
Leigh Hill Allison
Thomas T. Allison, Jr.
Helen McWane Allison
AmSouth Bank, N.A. and Marvin Cherner, Co-Executors of the Estate of Kaciel Cherner, Deceased
AmSouth Bank as trustee for The Greater Birmingham Foundation W. Felix Harris, Jr. Designated Fund
Ernest E. Armstrong
Charlotte Callis Atwood
Auction Insurance Agency Profit Sharing Trust
Nancy B. Averett

Helen C. Badt
Kathryn W. Baernstein
Elisabeth Bailliere
Anne Bailliere
Alexandra R. Bailliere
Mary Stuart Ramsay Baldwin
William H. Barnes
William H. Barnes, Jr.
Evelyn Morrow Barry
John R. Bates
Alice B. Bates
Jack Becker
Clemmie Weaver Bell
Maud G. C. Belser, custodian for Warren Belser III, UGMAAL
Elaine Bercu
Harold B. Blach, Jr.
Black Diamond Coal Mining Liquidating Trust
Ethelyn H. Bond
Richard A. Bowron and Ruth M. Bowron, as Joint Tenants
Richard A. Bowron
James Edgar Bowron, Jr.
James E. Breland and Annie W. Breland, JTTEN
Lela Anne Brewer
Marion C. Breyer
Caroline Marbury Bright
Harbert L. Brown and Lillian F. Brown, Joint Tenants
Harbert L. Brown
Mr. and Mrs. Hugh W. Buck, as joint tenants
The Bulls & Bears Investment Club, a Partnership
Evelyn S. Burger
Olive R. Burt
Jean K. Bynum
Joanne H. Callis, as Trustee for Stanlee H. Callis

Joanne H. Callis
William H. Cammack
Car & Company, as Trustee under the will of Charles Henderson
Winston Carl
Charles D. Carlisle
Kenneth M. Carnathan
Kirke White Cater
The Cathedral Church of the Advent Endowment Fund
Centennial Casualty Co.
Chapin Davis Pension Trust Fund
Bedford Chapin
Chapin Davis & Co.
Chapin Davis Profit Sharing Plan
Lois Chapman
George K. Chapman
Howard B. Cheek
J. Ted Cheek & Ellen H. Cheek, Joint Tenants
Marvin Cherner, as Executor under the will of Fannie Furst
Marvin Cherner, as Trustee under the will of Rachel Cherner
Marvin Cherner
Leona R. Cherner
Marvin Cherner, on behalf of K. Cherner Company
Mortimer A. Cohen
Thomas Coleman
George Coleman
Donald J. Collins
Dorothy C. Collins
Robert C. Collins
Edward C. Collins
Bester Wynne Colman, III, Executor of the Estate of Robert H. Cochrane III, Deceased, as Trustees under Hendrix, Mohr & Yardley, Inc. Revised Employee Profit Sharing Plan & Trust Agreement dated September 29, 1977

Jerome A. Cooper
Estate of Robert G. Cosper
Mary Lowe Cosper
John B. Cox, Jr.
Betty Crawford
Edith Johnston Crook
Dr. Charles B. Crow
Catherine C. Crow
Warren Baker Crow, IV, executor of the estate of Pauline M. Crow, Deceased
George E. Dailey, Jr.
The Danley Corporation, a corporation
Francis Evans Davies
Miriam Rew Davies
Alexander V. Davies
H. Melville Davis, Jr. and John B. Davis, Personal Representatives of the Estate of Louise B. Davis, Deceased
John B. Davis
Sara Druhan Davis
William E. Davis
Georgia D. Davis
H. Chace Davis, Jr.
Lee Ola Dewberry
Alice B. Diamond
Donald Berry Dumas
Lawrence Dumas, III
Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased
Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased, Trustees for W.B. Dumas
Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased, Trustees for A.D. Schanbacher

Lawrence Dumas, III and AmSouth Bank, N.A., Co-Executors of the Estate of Lawrence Dumas, Jr., Deceased, Trustees for J.H. Dumas II

L.G. Duncan

Jessellan Leach Dunn

James M. Dunn, Jr.

Lucie D. Greene Ellard

John D. Elmore

Equitable Securities Corporation, a corporation

Beverly B. Erdreich

Stanley Marx Erdreich, III

Mary Elizabeth Erdreich

Richard M. Evans

Mrs. James V. Fairley

Roberta J. Farr and Patricia J. Jenkins, Personal Representatives for the Estate of Richard Rider Jackson, Sr., as qualified on June 21, 1991

Jim Filler

First Alabama Bank, as Trustee under the will of Josephine B. Cohen

First Alabama Bank as trustee of Florence E. Simpson Trust

First Alabama Bank as trustee of Ellen A. Bush Testamentary Trust

First Alabama Bank as trustee of Ann Paget Trust for Frances Pizitz

First Alabama Bank as trustee of Marcia B. Stearns Trust No. 3 for Thomas Stearns

First Alabama Bank as trustee of George W. Stubbs, Jr. Marital Trust

First Alabama Bank, Personal Representative of George Stubbs Trust for E. Agee

First Alabama Bank as trustee of Marcia B. Stearns Trust II for Thomas Stearns

First Alabama Bank as Trustee under the will of Edmund C. Leach

First Alabama Bank as trustee of Marcia B. Stearns Trust for Gloria Stearns-Bruner

First Alabama Bank as trustee of Marcia B. Stearns Trust for Thomas Stearns

First Alabama Bank as trustee of Ellen A. Bush Trust

First Alabama Bank as trustee of Marcia B. Stearns Trust for Ethelyn Stearns

First Alabama Bank as trustee of J.T. Flagg Marital Trust-Testamentary

Effie Davis Flanagan

Alice Oden Ford

Allie N. Fort

Minnie Bell Jeffers Fowlkes, Personal Representative of the Estate of Henry Fowlkes, Jr., Deceased

B. Bell Jeffers Fowlkes

Corinne L. Fox

Borden Hughson Burr, II, and Robert S. Weatherly, Jr., Personal Representatives of the Estate of Anne F. Givhan, Deceased

Dale S. Gold

Thomas Douglas Bagley and Barbara Dawn Bagley, beneficiaries of the Paul D. Bagley Trust

Constance M. Gray

Jane J. Hagan

Florence V. Haigler

Fletcher L. Harris

Ann E. Hartsfield

Eleanor S. Hassinger

J.R. Hawkins

Jane Hill Head

Beverly P. Head, III

Edna S. Hebard and Donna J. Richardson Jarvis, Joint Tenants

John Joseph Heck

Lois Anne Ramsay Heck
Dorothy D. Hickman
J. David Higgins, Jr.
John D. Higgins, III
Robert Bond Higgins
D.R. Hillenbrand
Marion J. Hobart
C.B. Holliman
Dorothy Wood Hume
Fay L.J. Hynson Marital, Mercantile Safe Deposit & Trust Co., Co-Trustee with Richard Hynson, Sr. and Richard Hynson, Jr., under the will of Fay L.J. Hynson
Thomas A. Immler
Independent Presbyterian Church
Carson G. Inscho, Jr.
Hugh W. Jackson
Hugh W. Jackson, as Trustee for Hugh W. Jackson U/A/D 9/13/84
Richard R. Jackson, Jr., Roberta Jackson Farra, guardians for Richard R. Jackson, Sr.
Kate J. Jackson
Jackson Holding Company
Everett E. Jackson, IV
Richard R. Jackson, Jr.
Jane Craft Jackson
Elizabeth L. Porter James
Patricia Jackson Jenkins
Cornelia Murfree Johnson
Frank M. Johnston
Olmer C. Jones, as Executrix of the Estate of Fletcher E. Jones
Leo M. Karpeles, Jr.
Ruth L. Karpeles, as custodian for Leo M. Karpeles III and Margaret F. Karpeles

Leo M. Karpeles, Jr., as executor of the estate of Frances F. McEachern
Fred W. Kemp, Executor of the Estate of Sammie L. Kemp
Eleanor E. Kidd
Jane B. Knox
John L. Kontos
Leon A. Kontos
Bobbie R. Kontos
Leon A. Kontos, Jr.
Robert J. Kyle, Jr.
Lakeshore Hospital
Sally R. Lamar
Harald F. Lassen
William W. Lawrence, as administrator of the estate of Julia L. Kershaw
Alonzo H. Lee, Jr.
Alonzo H. Lee, Jr., as Executor of the Estate of Alonzo H. Lee
Mrs. Louise Aland Levin
Sadie C. Levy
Betty W. Loeb
Henry Sprott Long
Henry and Margaret P. Long, Trustees of Ruth Lacy Long Trust
George E. Lourie
Fariss Gambrill Lynn
Henry Sharpe Lynn, Jr.
Margaret C. Manis
Sarah Lawford Marbury
Harry Markstein, as executor of estate of Hazel R. Goldman
Roy C. Martin and Elizabeth R. Martin, Joint Tenants
Estate of Harold B. Mayes
Jill D. McArthur
Emily McCall
Willard McCall, Jr., as custodian for Willard McCall, III

Willard McCall
Robert L. McCalley
Estate of Dorothy Wood McCormack
Elonia P. McHenry
William K. McHenry, Jr.
Elizabeth Pitts McVay
Mercantile Safe Deposit & Trust Co., as Trustee under Trust Nos. 2338-0 and 23337
Mercantile Safe Deposit & Trust Company as custodian for Frances L. Nash
Mercantile Safe Deposit & Trust Company, Co-Trustee with Sheila McCreery Jackson, under the will of Richard N. Jackson, Jr.
Mercantile Safe Deposit & Trust Company and Catharine J. Dallich, Trustees under the will of Catharine B. Jackson
Mary Crawford Meriwether
Metalplate Company, Inc., a corporation
Harold F. Miller, Jr.
Alice M. Miller
Ethelyn H. Miller
Mining Ore and Equipment Co., Inc. Profit Sharing Trust
Mining Ore & Equipment Co., Inc. and its affiliates Profit Sharing Trust FBO M. Lee Mitchell and M. Lee Mitchell
Lucy M. Mitchell
M. Lee Mitchell Insurance, Inc. Profit Sharing Trust Segregated
Melinda Mitchell, Custodian for Christine Crouse and J. Cooper Crouse
Ms. Willard M. Mobley
Walter J. Morgan, Jr. and Helen D. Morgan, Joint Tenants
Delano Morris
Mary J. Brewer Murkett
Phillip T. Murkett, Jr.
James G. Nash

Linda Jane Nelson, as administrator of the estate of Harold B. Mayes
Alex W. Newton
North Carolina National Bank as Trustee of Rosanna Craft Trust
Charles S. Northen, III
William F. Owens
Dale Parker
William Phillips, Executor of the Estate of Bert Saeger
Ruth Carpenter Pitts
Charles C. Pitts
William H. Pitts
Pocahontas Land Company
Warren G. Porter
Charles K. Porter
Charles K. Porter IRA
Clyde H. Porter, Jr., Personal Representative of the Estate of Sadie Gay Porter, Deceased
Charles Edward Porter
Janice N. Porter, Trustee for John F. Porter Testamentary Trust
Maude Kendall Ryding Powell
Lydia K. Quick
Amory Edward Quinn, Jr.
Evelyn S. Ramsay
Robert Erskine Ramsay and Irene B. Ramsay, Joint Tenants
Robert McLester Ramsay
Realty Rental Company, a corporation
Fred W. Renneker, III
Joan Rittenbaum
Cornelia Wendel Johnson Rodde
Dorah Sterne Rosen, by Lawrence Rosen, attorney-in-fact
Alan Hayden Rosen
J. Neil Rosen
Dorah Lee Rosen

Mary Jeffray Ryding
Louis Sacks
Margaret P. Saeger
Louis Schulhafer, III, as executor of the Estate of Louis Schulhafer, Jr.
Walter E. Shackelford
Samuel M. Shay
Elizabeth A. Shay
Elisabeth D. Sherwood and Anne Bailliere, as Co-executors of the Estate of Elisabeth Dobbin
Elisabeth D. Sherwood
Anne Sherwood
Elisabeth D. Sherwood, custodian for Robert J. Kyle, Jr.
Elisabeth D. Sherwood, custodian for Anne D. Sherwood
Lottchen V. Shivers
Lee M. Shook, Executor of the Estate of Virginia Shook Blue
T. Julian Skinner, Jr.
Farley B. Snow
Estate of Madeline Solomon, Dale S. Gold, Executrix
Robert E. Spruiell
Margaret R. Starr
Marcia B. Stearns
Lawrence Rosen, Personal Representative of the Estate of Dorah H. Sterne, Deceased
Sterne Agee & Leach, Inc. Employees Profit Sharing Plan
Hubert M. Stiles
Lilian C. Stiles
Margaret B. Stroud
Suburban Properties, Inc.
Mary Hiden Crowder
Marion K. Tortorici, custodian for Natalie A. and Samuel M. Tortorici

Tutwiler Investment Co., a corporation
Pauline Tutwiler
Temple W. Tutwiler, III, as trustee of T.W. Tutwiler II Inter-Vivos Trust
Allen J. Tutwiler
Union Bank & Trust Company, Executor of the Estate of Etna McGaugh Atkinson, Deceased
Universal Securities Corporation Defined Benefits Pension Plan
Universal Securities Corp., a corporation
Lois H. Vick
Nancy Smith Walker
Thomas E. Walker, Jr.
John Neal Walker
Lucy G. Walker
Eugene Walters
Ruby G. Warren
William Ramsey Watkins
Mary H. Watson
Melba K. Watters, Executrix, Estate of Reynolds W. Watters
Nolan John Wehby
Frank S. White, III
Virginia McGahey White
Murray C. White
Annelise W. Wiesel
Maurine H. Monsky Wiener
Anne Maring Wiley
Delmar H. Williamson
James M. Wilson
Nancy Knight Wilson
Thomas F. Wimberly, Executor of the Estate of Margaret F. Wimberly
Ethel Snyder Brown Wingo
Betty Bashinsky Wise

Wittichen Supply Co., a corporation
W.H. Woolverton, Jr., Executor of the Estate of Susan Orr Woolverton, Deceased
Sylvia D. Worrell
Mary Belle N. Yardley
Thomas K. Yardley
Charles G. Yeager
Elizabeth A. Yeilding
Juliett M. Zarzaur

AMSOUTH PETITIONERS

AmSouth Bank, as Trustee of the Robert Meyer Foundation
AmSouth Bank, as Trustee of the Robert R. Meyer Memorial Scholarship Fund
AmSouth Bank, as Trustee under Agreement Executed November 9, 1973, by the Board of Directors of the Alabama Boys Industrial School
AmSouth Bank, as Agent for the Family and Child Services Agency
AmSouth Bank, N.A., and Lawrence Dumas, III, Co-Executors of the Estate of Lawrence Dumas, Jr., deceased
AmSouth Bank, as Trustee of the Katherine H. Dorsey Revocable Trust
AmSouth Bank, as Trustee of the Reid Thompson Revocable Trust
AmSouth Bank, as Trustee of the Vernon Van Aken Trust Under Agreement
AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of Margaret Gaines
AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of Allen A. Johnson, Jr.
AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of C.L. Gaines, III

AmSouth Bank, as Trustee of the P.G. Shook Irrevocable Trust for the Benefit of Hansell Burke

AmSouth Bank, as Trustee of the Charitable Trust Under the Will of Pearl E. Ray

AmSouth Bank, as Trustee of the Kirby W. Sevier Testamentary Family Trust

AmSouth Bank, as Trustee of the Madeleine McCormack Testamentary Trust

AmSouth Bank, as Trustee of the P.G. Robinson Family Trust for the Benefit of M. Turner

AmSouth Bank, as Trustee of the Cornelia Robinson Testamentary Trust

AmSouth Bank, as Trustee of the Lilla Sevier Huffman Irrevocable Trust

AmSouth Bank, as Trustee Under the Will of Carr McCormack for the Benefit of Carr McCormack, Jr.

AmSouth Bank, as Trustee Under the Will of Carr McCormack for the Benefit of George E. McCormack

AmSouth Bank, as Trustee Under the Pension Trust Agreement Executed By AmSouth Bancorporation on December 13, 1973

AmSouth Bank, as Trustee of the Margaret R. Monaghan Testamentary Trust

AmSouth Bank, as Trustee of J. Frank Rushton Family Trust

AmSouth Bank, as Agent for Henry S. Lynn

AmSouth Bank, as Custodian for Rucker Agee

AmSouth Bank, as Trustee of the M. McWane Item 9 Trust for the Benefit of H.M. Allison

AmSouth Bank, as Trustee of the M. McWane Item 10 Trust for the Benefit of E.M. Fairley

AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of J.M.G. Parker, Jr.

AmSouth Bank, as Trustee of the Cabaniss, Johnston and Gardner Self Employed Money Purchase Pension Trust Agreement

AmSouth Bank, as Executor of the Grosvenor C. Dyar Estate
AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of Katherine Hamm
AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of Ben Moore, III
AmSouth Bank, as Trustee of the Robert R. Meyer Testamentary Trust C
AmSouth Bank, as Trustee of the W.J. Cabaniss Trust Under Agreement for the Benefit of J.C. Harrison
AmSouth Bank, as Trustee of the Marital Trust Under the Will of J.R. McDavid
AmSouth Bank, as Trustee of the Trust Under the Will of J.R. McDavid for the Benefit of Carolyn M. Ray
AmSouth Bank, as Trustee of the Trust Under the Will of L.L. Moore for the Benefit of James and F.M. Parker
AmSouth Bank, as Trustee of the Dorah H. Sterne Term Trust for the Benefit of Allan H. Rosen
AmSouth Bank, as Trustee of the Dorah H. Sterne Term Trust for the Benefit of Jacob N. Rosen
AmSouth Bank, as Trustee of the Dorah H. Sterne Term Trust for the Benefit of Dorah L. Rosen
AmSouth Bank, as Agent for the Natalie G. Sperling Investment Agency
AmSouth Bank, as Trustee of the Marital Trust Under the Will of Edgar Allan Rowe, Sr.
AmSouth Bank, as Trustee of the Family Trust Under the Will of Edgar Allan Rowe, Sr.
AmSouth Bank, as Trustee of the Frederick G. Koenig, Jr., Marital Trust
AmSouth Bank, as Trustee of the Frederick G. Koenig, Jr., Family Trust
AmSouth Bank, as Trustee of the Germer Petesch Trust Under Agreement

AmSouth Bank, as Trustee of the C. Shook Testamentary Trust for the Benefit of Allen A. Johnson, Jr.

AmSouth Bank, as Trustee of the C. Shook Testamentary Trust for the Benefit of Margaret Gaines

AmSouth Bank, as Custodian for Dorah H. Sterne

AmSouth Bank, as Investment Advisor for Mrs. Roy Hickman

AmSouth Bank, as Agent for Susan Shook

AmSouth Bank, as Custodian for Dr. Louise Branscomb

AmSouth Bank, as Trustee of the M.S. McWane Trust Under Agreement for the Benefit of E.M. Fairley

AmSouth Bank, as Trustee of the M.S. McWane Trust Under Agreement for the Benefit of H.M. Allison

AmSouth Bank, as Trustee of the H.M. Allison Trust for the Benefit of Thomas M. Allison

AmSouth Bank, as Trustee of the Isabel Anderson Comer Trust Under Agreement

AmSouth Bank, as Trustee of the Robbie O. Sevier Trust Under Agreement

AmSouth Bank, as Trustee of the Teresa Shook Testamentary Trust

AmSouth Bank, as Trustee of the Trust Under the Will of Evelyn F. Jones

AmSouth Bank, as Trustee of the Family Trust Under the Will of David D. Wendel

AmSouth Bank, as Agent for Bess Bailey Coe, Trustee of the Family Trust Under the Will of John V. Coe, Jr.

AmSouth Bank, as Custodian for the Executor of the Mary Mellen Estate

AmSouth Bank, as Successor Trustee Under the Will of James D. Hammett by Court Order Dated November 27, 1961 for the Benefit of Lula H. Morris

AmSouth Bank, as Trustee of the Bess Bailey Coe Revocable Trust

AmSouth Bank, as Trustee of the Bernice P. Carlson Revocable Trust

AmSouth Bank, as Trustee of the Dave Sokol Trust Under Agreement

AmSouth Bank, as Trustee of the Loris C. Rich Revocable Trust

AmSouth Bank, as Trustee of the S. Gregg Meyer Trust Under Agreement

AmSouth Bank, as Trustee of the Frank M. Young, III Trust Under Agreement

AmSouth Bank, as Trustee of the Drayton Nabers Trust Under Agreement

AmSouth Bank, as Trustee of the Naldo A. Roberts Revocable Trust

AmSouth Bank, as Trustee of the Nancy M. McAdoo 1978 Trust Under Agreement

AmSouth Bank, as Trustee of the V.B. Murray, Jr., Revocable Trust

AmSouth Bank, as Trustee of the John Terry Badham, Sr. Revocable Trust

AmSouth Bank, as Trustee of the L.E. Bashinsky Trust No. 7 for the Benefit of L.M. Bashinsky, III

AmSouth Bank, as Trustee of the L.E. Bashinsky Trust No. 8 for the Benefit of R.B. Bashinsky

AmSouth Bank, as Trustee of the John F. Mummert Marital Trust

AmSouth Bank, as Trustee of the John F. Mummert Testamentary Family Trust

AmSouth Bank, as Trustee of the Trust Under the Will of Alice Maring for the Benefit of Anne Wiley

AmSouth Bank, as Trustee of the J. Edgar Bowron Trust for the Benefit of Irene M. Bowron

AmSouth Bank, as Trustee of the Trust Under the Will of H. Sanson for the Benefit of F. Cabaniss

AmSouth Bank, as Trustee of the Robert R. Meyer Testamentary Trust D

AmSouth Bank, as Trustee of the W.J. Cabaniss Trust Under Agreement for the Benefit of W. Cabaniss, Jr.

AmSouth Bank, as Trustee of the W.J. Cabaniss Trust Under Agreement for the Benefit of F.C. Parnegg

AmSouth Bank, as Agent for Henry P. Johnston

AmSouth Bank, as Agent for Louise F. Johnston

AmSouth Bank, as Agent for the Roden Coal Company Investment Agency

AmSouth Bank, as Agent for Pauline B. Pinto

AmSouth Bank, as Custodian for Patricia F. Watkins

AmSouth Bank, as Executor of the Perrin M. Porter Estate

AmSouth Bank, as Executor of the William Hawkins Ellis Estate

AmSouth Bank, as Trustee of the Margaret O. Badham Revocable Trust

AmSouth Bank, as Trustee of the J.M. Burt Testamentary Trust

AmSouth Bank, as Trustee of the M.H. & F.M. Young, III Trust for the Benefit of F.M. Young, IV

AmSouth Bank, as Trustee of the M.H. & F.M. Young, III Trust for the Benefit of M.C. Young

AmSouth Bank, as Agent for Hanna Company, Inc.

AmSouth Bank, as Trustee of the Trust Under the Will of W.M. Spencer, Jr.

AmSouth Bank, as Trustee of the Ethelyn H. Bond Revocable Trust

AmSouth Bank, as Trustee of the J. B. Pritchett Testamentary Trust

AmSouth Bank, as Trustee of the Florence Bush and Children's Trust D dated October 21, 1954 Under Agreement with A. P. Bush

AmSouth Bank, as Agent for Anne Fonde Strauss Fies

AmSouth Bank, as Trustee for Shotts Walburn McCord Profit Sharing Plan, Walburn Account

AmSouth Bank, as Trustee for Shotts Walburn McCord Money Purchase Pension Plan, Walburn Account

AmSouth Bank, as Trustee of the Willis Penfield Revocable Trust

AmSouth Bank, as Trustee of the Kathryn Seay Revocable Trust

AmSouth Bank, as Trustee of the Herrod Sherwood Self Employed Retirement Plan, Sherwood Account

AmSouth Bank, as Trustee of the Herrod Sherwood Self Employed Retirement Plan, Herrod Account

AmSouth Bank, as Executor of the Estate of James M. Fairley

AmSouth Bank, as Trustee of the Joan C. Harrison Revocable Trust

AmSouth Bank, as Trustee of the Leo Mendel Family Trust

AmSouth Bank, as Trustee of the Leo Mendel Marital Trust

AmSouth Bank, as Trustee of the Morris Sokol Revocable Trust

AmSouth Bank, as Co-Trustee of the Laurie Amanda Oden Testamentary Trust

AmSouth Bank, N.A. and Marvin Cherner, Co-Executors of the Estate of Kaciel Cherner, deceased

AmSouth Bank, N.A., as Trustee for the Greater Birmingham Foundation W. Felix Harris, Jr. Designated Fund

AmSouth Bank, in its representative capacity for all persons or entities which (i) tendered their ABC shares to Drummond, as hereafter defined, pursuant to the tender offer of December 4, 1984; (ii) sold, transferred, acquired, distributed or disposed of their ABC shares other than in the tender offer or merger; or (iii) relinquished their shares pursuant to the cash-out merger accomplished by Drummond and ABC in August of 1985

AmSouth Bank of Alabama

AmSouth Bancorporation

DURKEE PETITIONERS

John M. Adams
Amy Neal Ager
John Allen Bearden and Frances W. Bearden
Barney Bernstein
Pauline W. Bernstein
Richard Bernstein
Gayle D. Boon
Arthur B. Durkee, Jr.
Katherine Agee Durkee
Elizabeth Ann Ellett and John Howard Ellett
Elizabeth Ann Ellett and John Howard Ellett, as Co-executors of the estate of Howard K. Ellett
Trudy R. Evans as Custodian for Walter B. Evans, Jr.
Trudy R. Evans as Custodian for John Parker Evans, II
Walter B. Evans
Fairfield Avenue Property
Fredrika L. Felt
Joel Felt
James W. Gewin
James W. Gewin, as executor of the Estate of Anna S. Gewin
Lee Gewin
Bradley M. Gewin as Trustee for Leslie S. Gewin
Bradley M. Gewin, as Trustee for William Hampton Gewin
James W. Gewin, as Trustee for Juliette G. Hamner
James Green, Jr.
Richard M. Compton, as Executor of the Estate of Madeleine Hatcher
Mrs. Frank C. Jones
Margaret McCormack Jones
Elvira C. McMillan and Thomas Edwin McMillan
Mrs. William Mobley
First Alabama Bank as personal representative of the estate of Mary Elizabeth Agee

Frederick W. Murray, Jr., as Trustee for Virginia W. Murray Revocable Trust

Frederick W. Murray, Jr., as Trustee for Frederick W. Murray Revocable Trust

Phil H. Neal, Jr.

Phil C. Neal

Sarah B. Neal

Phil Hudson Neal, III

Phil H. Neal, Jr., as Trustee for Samuel Abney Britton Neal

Phil H. Neal, Jr., as Co-Trustee for Marital Trust of Phil H. Neal, Sr.

Phil H. Neal, Jr. and First Alabama Bank as co-executors of the Estate of Amy Gross Neal

Marion D. Pennington and SouthTrust Bank of Alabama, N.A., Co-Trustees of the Edward W. Pennington Marital & Family Trusts

SouthTrust Bank of Alabama, N.A., as executor of the estate of Gena H. Windham

SouthTrust Bank of Alabama, N.A., as executor of the estate of Elizabeth C. Dannelly

Moore W. Peregrine and Phil C. Neal, as co-executors of the estate of and personal representatives of Carrie C. Neal

Elberta G. Reid

Josephine W. Simpson

Virginia E. Simpson

Elizabeth B. Simpson

Louise H. Southerland, as trustee under the will of Jack R. Wilson

Harry R. Teel

Jesse T. Todd, Sr.

Anne Blair Wrinkle

Margaret Rucker Wrinkle

Louise Agee Wrinkle

John N. Wrinkle

RESPONDENTS

Drummond Company, Inc.
Drummond Coal Sales, Inc.
Charles W. Adair
Elbert A. Drummond
Garry N. Drummond
Joseph E. Nicholls, Jr.
Alma Moss Self as Executrix of the Estate of Raymond Weaver Self, deceased

APPENDIX B

Rule 29.1 Listing

Petitioner, AmSouth Bank, N.A.'s, parent corporation is AmSouth Bancorporation

Petitioner, Car & Company, is now known as Troy Bank & Trust Company

Petitioner, Centennial Casualty Company, is a wholly-owned subsidiary of Auction Insurance Agency, Inc.

Petitioner, Equitable Trust Company, is a subsidiary of Equitable Securities Corporation

Petitioner, First Alabama Bank's, parent corporation is Regions Financial Corporation

Petitioner, Jackson Holding Company's, subsidiary corporation is Jackson Insurance Agency, Inc.

Petitioner, Mercantile Safe Deposit & Trust Co.'s, parent corporation is Mercantile Bankshares Corporation

Petitioner, North Carolina National Bank, now known as Nations Bank of Florida, NA's, parent corporation is Nations Bank Corporation

Petitioner, SouthTrust Bank of Alabama, N.A.'s, parent corporation is SouthTrust Corporation

NONE OF THE OTHER CORPORATE PETITIONERS HAS A PARENT CORPORATION OR NON-WHOLLY-OWNED SUBSIDIARY.

APPENDIX C

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1995

1930066

John H. Martin, et al.

v.

Drummond Company, Inc., et al.

1930067 and 1930070

AmSouth Bank,
as trustee of the Leo Mendel Family Trust, et al.

v.

Drummond Company, Inc., et al.

1930068 and 1930069

Arthur B. Durkee, Jr., et al.

v.

Drummond Company, Inc., et al.

Appeals from Jefferson Circuit Court
(CV-91-0143, 91-3431, and 91-3426)

ALMON, JUSTICE.

The plaintiffs, former holders of stock in Alabama By-Products Corporation ("ABC"), appeal from a summary judgment for the defendants on the plaintiffs' claims that the defendants acquired their stock through coercion, fraud, or breach of fiduciary duty. The same claims were presented in a class action in the Delaware Chancery Court of New Castle County, *Hynson v. Drummond Corp.* (CV 7904, Del. Ch. 1990), and were extinguished in a settlement awarding damages to the plaintiff class. The issue is whether the *Hynson* judgment bars this action under the doctrine of res judicata or is not binding on these plaintiffs on the basis that the Delaware Chancery Court certified the class without giving class members the right to exclude themselves from the action.[1]

I.

This dispute concerns the value of the stock of ABC, a Delaware corporation, at the time it was acquired by Drummond Coal Company, Inc., now Drummond Company, Inc. ("Drummond"). In 1977, Drummond, through a subsidiary, acquired a controlling interest in ABC. It thereafter initiated several attempts to merge ABC into Drummond. In response to one such attempt in 1983, several ABC stockholders formed the

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[1] By an amendment to the complaint, the plaintiffs alleged that they were not barred by the *Hynson* judgment because their interests had not been adequately represented in that action, but they do not make that argument on appeal.

Shareholders' Protective Committee ("SPC"). The members of the SPC were lawyers and stockbrokers in Birmingham. ABC stock was traded over the counter, and Sterne, Agee & Leach, Inc., a Birmingham investment firm, was the principal market maker of ABC stock. A senior member of the firm was one of the members of the SPC. The SPC opposed Drummond's 1983 attempt to merge ABC into Drummond for $65 per share of ABC stock. In 1982, market bid prices for ABC ranged from a high at the beginning of the year of $69 to a low at the end of the year of $44, which is about where it stood on March 17, 1983, when the $65 merger proposal was announced. The SPC obtained information on ABC through a court action, hired an analyst to derive a value for ABC stock, and took the position that the stock was worth more than $100 per share. It sent a detailed explanation of its valuation to the stockholders other than Drummond. Drummond sought an independent evaluation from Kidder, Peabody & Co., which informed Drummond that it was "unable to conclude that the consideration ... is fair from a financial point of view to [the] shareholders." Drummond withdrew the 1983 merger proposal in September.

On December 5, 1984, Drummond made a tender offer to pay $75 per share for all of the shares of ABC that it did not own.[2] The tender offer circular detailed the history of Drummond's acquisition of a majority interest, of its efforts to acquire the remainder of the stock, and of other valuations of the stock, including the SPC's valuation of the stock at more than $100 per share. The circular stated: "The Offerors[3] believe that the cash price of $75 per Share offered hereby is fair to unaffiliated ABC stockholders." This statement forms the basis of the allegation of fraud against Drummond; the plaintiffs here contend, as did the class

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[2] Market trades for ABC stock in 1984 before the tender offer ranged between $48 and $55. These and the above figures for market trades were included in the tender offer circular.

[3] Drummond and its subsidiary.

representatives in *Hynson*, that Drummond knew that ABC stock was worth substantially more on an asset valuation basis as opposed to a market valuation. A principal factor in the alleged undervaluation is Drummond's knowledge of the value of ABC's proven coal reserves, its timberland, and its cash flow.

Under another section of the circular, entitled "Additional Purchases of Shares and Possible Merger," Drummond stated: "Upon consummation of the Offer and from time to time thereafter, the Offerors and their affiliates will consider alternatives available to them to satisfy their ultimate goal of achieving ownership of the entire equity interest in ABC." Drummond said it might purchase additional shares or it might propose a merger, with the "timing, structure and terms of any merger" to be determined by Drummond later. The circular also stated that, if Drummond acquired 90% or more of the ABC stock, "it could effect a merger with [ABC] on any terms it chose." The following section of the circular, "Effects of Offer, Additional Purchases of Shares and Possible Merger; Future Plans for the Company," stated that Drummond might "propose to the Board of Directors of [ABC] that it consider reduction or elimination of dividends." By the time of the tender offer, Drummond had voting control of the board of directors of ABC—a majority of its members had been placed by Drummond through its control of a majority of the ABC stock.

These representations of an uncertain future for non-tendering shareholders, including the possibility of holding stock that did not pay dividends and would probably not be marketable, form the basis of the allegations by the plaintiffs here and in *Hynson* that the tender offer was coercive.

The board of directors of ABC met quickly in response to the tender offer. Charles Adair, the president and chief executive officer of ABC, who had taken office after Drummond had acquired the majority of the ABC stock and who had previously been Garry Drummond's executive assistant, was in Washing-

ton, D.C., the day the tender offer was announced. Adair flew back to Birmingham on a Drummond Company airplane the next day, and a meeting of the ABC board of directors was held at the Drummond Company hangar. The board of directors of ABC voted to take a neutral position on the tender offer. This action, coupled with the board's alleged failure to inquire into the fairness of the offering price or any other aspects of the tender offer, is the basis of the allegations of breach of fiduciary duty against the board members who are the individual defendants in this action and who were defendants in *Hynson*.

On December 18, the SPC wrote a letter to many of the ABC stockholders indicating its opposition to the tender offer and stating, "The Committee continues to believe that the ABC stock has a value of not less than $100 per share." Among the reasons given by the SPC for its belief that "the disclosures made by Drummond are not adequate" were that "Drummond has not given consideration to the liquidation value of ABC"; "Drummond has failed to inform the public stockholders of ABC as to the value of the coal resources and reserves of ABC"; "ABC has approximately 60,000 acres of timberlands," the value of which was not disclosed by Drummond; and Drummond's income projections for ABC were low. In short, the very points now alleged as bases for the fraud allegations were known to the ABC stockholders at an early stage in the tender offer, if not before.

Enough ABC shareholders responded to the tender offer that Drummond acquired through the tender offer, together with the stock it already owned, approximately 91% of the outstanding stock of ABC. It effected a short-form merger in August 1985 and acquired, for $75.60 per share, the remainder, except that some of the remaining ABC stockholders filed for an appraisal and obtained a higher price, as explained below. The plaintiffs in the actions below, appellants here, owned ABC stock that Drummond acquired either through the tender offer or through the merger.

On January 4, 1985, less than a month after Drummond made the tender offer, several ABC stockholders filed a class action, *Hynson v. Drummond Coal Co.*, *supra*, in the Delaware Chancery Court of New Castle County on behalf of a class of all ABC stockholders other than the defendants. On December 3, 1985, several shareholders who did not tender their shares and who objected to the merger filed an action in the Delaware Chancery Court of New Castle County for a judicial appraisal of their shares. *Neal v. Alabama By-Products Corp.*, CV No. 8282 (Del. Ch. 1990).[4] The *Neal* plaintiffs were excepted from the *Hynson* class. Many of the plaintiff ABC shareholders tendered some shares, surrendered some in the merger, and held some for appraisal, or otherwise deliberately took advantage of two of these three options.

In a settlement of *Hynson* in November 1989, Drummond agreed to pay about $5,000,000, approximately an additional $5 per share of ABC stock. Notice of the settlement was mailed to the class members on November 29, 1989. The notice did not give the class members a right to opt out, but it did provide the following:

> "Any member of the Class who objects to the certification of the Class, the Stipulation, the Settlement, the judgments with respect thereto, and/or the award of attorneys' fees and expenses to plaintiffs' counsel, or who otherwise wishes to be heard, may appear in person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant. . . .
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> "Any person who fails to object in the manner prescribed above shall be deemed to have waived such objection and shall be forever barred from raising such objection in this or any other action or proceeding."

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[4] The appeal of *Neal* is reported as *Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991).

On February 1, 1990, a hearing was held on the *Hynson* settlement, and no class member objected to the settlement or requested exclusion from the action. The Delaware Chancery Court entered a judgment approving the settlement and enjoining any class member from bringing any other action asserting any of the settled claims against any of the defendants.

Meanwhile, the *Neal* appraisal action had been tried from June 17, 1989, through July 7, 1989. The Delaware Chancery Court did not enter a judgment until August 1, 1990, when it found an appraised value of $180.67 per share. That judgment was affirmed. *Alabama By-Products Corp. v. Neal*, 588 A.2d 255 (Del. 1991).

The *Neal* valuation prompted the instant actions. The first complaint was filed by John H. Martin; amendments to his complaint added approximately 336 named plaintiffs.[5] Arthur B. Durkee, Jr., and others filed motions to intervene and complaints in intervention. AmSouth Bank, as trustee of a number of trusts owning ABC stock, also filed a motion to intervene and filed a complaint in intervention. All plaintiffs had been members of the *Hynson* class. The defendants named in these complaints had all been defendants in *Hynson*. The allegations of wrongdoing in these present cases are essentially the same as those made in *Hynson*.

II.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985), the United States Supreme Court held that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, *even though that plaintiff may not possess* the *minimum contacts with the forum* which would support personal jurisdiction over a defendant" (emphasis added). The Court further held:

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[5] Significantly fewer persons were actually involved, because, for example, numerous plaintiffs were named individually and as trustees of several trusts.

> "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,[3] it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, *we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.* Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.
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> "[3] Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class."

Id., at 811-12 (citations omitted; emphasis added).[6] The plaintiffs rely on the emphasized language quoted above from *Phillips*

[6] A question similar to the one presented here was recently presented to the United States Supreme Court—"[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf"—but the Court dismissed the writ of certiorari as improvidently granted. *Ticor Title Ins. Co. v. Brown*, ___ U.S. ___, ___, 114 S. Ct. 1359, 1361 (1994).

Petroleum v. Shutts to contend that, because the Delaware Chancery Court failed to give them, as absent class plaintiffs,[7] the right to opt out of *Hynson*, its judgment does not bind them and does not bar their Alabama actions on the same subject matter. The Jefferson County Circuit Court entered a summary judgment for the defendants, holding that the res judicata effect of the Delaware judgment bars these actions.

III.

The parties argue at length regarding the *Shutts* statement that due process requires that a plaintiff class member in a class action for money damages be given a right to opt out of the action. The majority of this argument becomes irrelevant, however, when we start from the proposition emphasized in our first quotation from *Shutts*, which indicates that its holding pertains when the plaintiff class members do not have such contacts with the forum state as would support an exercise of *in personam* jurisdiction over a defendant. The plaintiffs have such contacts here, consisting of: their ownership of stock in a Delaware corporation; the fact that *Hynson* concerned the value of that stock; and their participation in *Hynson*, indicating submission to the Delaware court's jurisdiction. Furthermore, they received all of the due process components required by *Shutts*—notice, an opportunity to be heard, the best practicable notice, a description of the action and their rights in it, and adequate representation—lacking only an express right to opt out. The Delaware Supreme Court, however, had provided, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), a discretionary right to opt out even in class actions that did not give an absolute right to opt out, and none of these plaintiffs objected to the failure to give a right to opt out or requested the

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[7] "Absent class plaintiff" refers to a plaintiff who is not a named party, not necessarily to a plaintiff who is absent from the jurisdiction. *Hansberry v. Lee*, 311 U.S. 32 (1940); 1 H. Newberg and A. Conte, *Newberg on Class Actions* § 1.02 (3d ed.).

Hynson court to allow them, within its discretion, to opt out. For all these reasons, the plaintiffs should not now be allowed to collaterally attack the *Hynson* judgment.

IV.

Both Delaware and Alabama have adopted the federal class action rules. Relevant here is the distinction between certification of classes pursuant to Rule 23(b)(1), (b)(2), and (b)(3), Del. Court of Chancery Rules:

> "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:
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> > "(1) The prosecution of separate actions by or against individual members of the class would create a risk of:
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> > > "(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> > > "(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> "(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corre-

sponding declaratory relief with respect to the class as a whole; or

"(3) The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

"(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

"(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

"(D) The difficulties likely to be encountered in the management of a class action."

Rule 23(c)(2) imposes heightened requirements for class actions maintained pursuant to Rule 23(b)(3), including the right to opt out:

"(2) In any class action maintained under paragraph (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members

who can be identified through reasonable effort. The notice shall advise each member that:

> "(A) The Court will exclude him from the class if he so requests by a specified date;
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> "(B) The judgment, whether favorable or not, will include all members who do not request exclusion; and
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> "(C) Any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

When a class action is maintained pursuant to Rule 23(b)(1) or (b)(2), Rule 23(c)(3) contemplates that members will not be given the opportunity to opt out, but, on the contrary, that all members will be bound by the judgment:

> "(3) The *judgment* in an action maintained as a class action under paragraph (b)(1) or (b)(2), whether or not favorable to the class, *shall include* and describe those whom the Court finds to be *members of the class*. The judgment in an action maintained as a class action under paragraph (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph (c)(2) was directed, and who have not requested exclusion, and whom the Court finds to be members of the class."

(Emphasis added.) The corresponding provisions of Rule 23 in the Alabama and Federal Rules of Civil Procedure are substantially identical.

The *Hynson* court certified the class as a Rule 23(b)(1)(A) and a Rule 23(b)(2) class. All plaintiff class members were given notice of the action, although, as stated above, the notice did not inform the class members that they could opt out of the class.

V.

After Martin and the other plaintiffs filed these actions, the defendants filed in *Hynson* a motion pursuant to Rule 60(b)(3) and Rule 23, Del.R.Civ.P., for an order confirming that *Hynson* was properly certified as a class action under Rule 23(b)(1) and (b)(2). Chancellor Allen, who presided over the *Hynson* proceedings, acknowledged that the question whether the judgment in *Hynson* barred the actions at issue here "is ultimately a question of federal law that is to be answered in the first instance by the courts of the State of Alabama." He nevertheless entertained what he described as "this procedurally unusual motion," because "these claims cast a shadow on this court's processes," because he had not addressed the certification issue in writing during the pendency of *Hynson*, and because "it may be helpful to later courts to have this court's view." He entered an order on June 14, 1991, which is reported as *Hynson v. Drummond Coal Co.*, 601 A.2d 570 (Del. Ch. 1991); the above-quoted remarks appear at p. 571. We respectfully acknowledge Chancellor Allen's efforts toward resolving this dispute, and we appreciate his views.

Chancellor Allen expressed the question and his resolution of it thus:

> "The central question raised by this motion is of general importance. It is whether a single jurisdiction with *in personam* jurisdiction over the corporation and all of its directors may, in a single action, conclusively adjudicate whether a corporation's directors have satisfied their fiduciary duties to the corporation and its shareholders in the context of a corporate merger or other corporate transaction. *See Nottingham Partners v. Dana*, Del.Supr., 564 A.2d 1089 (1989); *In the Matter of Colt Indus. Shareholders' Litig.*, 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160 (1991).

"This question was left unanswered by the Supreme Court of the United States in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts* the Supreme Court held that, so long as class members are afforded an opportunity to 'opt-out' of the action, the due process clause does not require that all members of a plaintiff class have such 'minimal contacts' with the forum jurisdiction as would sustain *in personam* jurisdiction over each class member under the analysis of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *See Shutts*, 472 U.S. at 812, 105 S.Ct. at 2974. The court noted its holding was 'limited to those class actions concerning claims wholly or predominately for money judgments. We [the Supreme Court] intimate no view concerning other types of actions, such as those seeking equitable relief.' *Shutts*, 472 U.S. at 811 n. 3, 105 S.Ct. at 2974 n. 3.

"In this action, absent plaintiff class members were afforded no right to opt-out. This case therefore raises the question that the presence of such a right eliminated in *Shutts*: whether, in order to be preclusively bound by a judgment in a properly conducted Rule 23(b)(1) or (b)(2) action (in which no opt-out option is provided), a member of the class must have a sufficient nexus with the rendering jurisdiction as to make permissible exercise of *in personam* jurisdiction over that person, with respect to the claims in issue? The question as it arises here is, of course, not so general as that. This case involves a particular class of litigation: stockholder action against corporate fiduciaries. That fact supplies important context for addressing the subsidiary question: whether ownership of corporate stock itself constitutes such a relationship with the corporate domiciliary jurisdiction that it is fair to

subject the holder of stock to that jurisdiction for the purpose of adjudicating the existence or contours of corporate rights that attach to stock ownership.

"For the reasons set forth below, considerations both of efficiency and fairness in our federal system, in my opinion, require that a single adjudication be available in which charges of breach of a director's or controlling shareholder's duty to a corporation and its shareholders may be conclusively determined and all holders of stock bound. It is further my view, as explained below, that where the issue is whether a plaintiff class may be bound to an adjudication of the equitable duty of loyalty created by the law of the incorporating state, that the purchase (or merely holding) of the shares of a corporation of that state itself creates a sufficient relationship with that jurisdiction to permit that jurisdiction to be one in which rights attaching to stock of the corporation may be conclusively adjudicated."

601 A. 2d at 571-72.

Chancellor Allen also expressed his conclusion as follows:

"In my opinion, the device of a properly administered class action may be employed, without affording opt-out rights, to bind all absent shareholder/plaintiffs to a final judgment in an action seeking to vindicate rights attaching to corporate stock, whether those rights are sought to be protected by injunction or compensated by an award of money."

601 A.2d at 575. Without detailing all of Chancellor Allen's reasoning, we note the following point he expressed:

"The traditional rule (and still the rule by statute with respect to Delaware corporations)[n] is that stock has its legal situs in the domiciliary jurisdiction. *See* 11 W.

> Fletcher, *Cyclopedia Corporations*, § 5101 (Perm. ed. 1982). [n.]*See* 8 *Del. C.* § 169 (1983)."

601 A.2d at 576.

VI.

Chancellor Allen's reliance on these plaintiffs' stock ownership as giving the Delaware court jurisdiction over them presents a possible problem of compliance with *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, the United States Supreme Court held that Delaware's assertion of jurisdiction over a dispute between stockholders and the directors of the corporation by sequestering the directors' stock in the Delaware corporation violated the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Court held that the defendants' ownership of stock in a Delaware corporation did not give jurisdiction to the Delaware courts over the defendants where the dispute had nothing to do with the corporate stock.[8] Although the Court disapproved the use of such *quasi in rem* jurisdiction to attach the defendants' property and to make them subject to personal jurisdiction to avoid loss of that property where the property had nothing to do with the cause of action, it said that the argument for applying *International Shoe*'s "minimum contacts" test to assertions of *in rem* jurisdiction

> "does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it

[8] Instead, the action alleged mismanagement by the defendant directors and officers of the corporation's business, leading to substantial liabilities of the corporation. The Court cited the fact that several of the defendants did not own stock in the corporation and thus were not brought into court in Delaware through the sequestration procedure as evidence that the claim did not in fact relate to the ownership by most of the defendants of stock in the corporation.

> would be unusual for the State where the property is located not to have jurisdiction. . . .
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> "It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris v. Balk*[, 198 U.S. 215 (1905),] and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action."

433 U.S. at 207-09 (footnotes omitted).

Thus, it at least appears that *Shaffer* may be distinguishable on the basis that the ownership of stock in ABC is directly related to the cause of action. The Court of Appeals for the Third Circuit held in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 480, 130 L. Ed. 2d 393 (1994):

> "An appropriate basis for the Delaware court's power to bind non-resident shareholders in such a proceeding is ownership of Vitalink stock[6] together with any other activity engaged in by the members of the class pursuant to their shareholder rights. Thus, in this collateral attack we are concerned with whether the Delaware Court of Chancery had specific jurisdiction to bind non-resident members of the plaintiff class like Holbrook.
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> "In the present case, plaintiff Holbrook and all other class members owned stock in Vitalink, a Delaware corporation. Nevertheless, we need not decide whether the single act of purchasing and owning stock in a

> Delaware corporation would provide sufficient contacts for the state court to exercise specific jurisdiction over every member of the class because the record discloses that Holbrook had an important further contact with the Delaware forum. By surrendering his shares in response to the tender offer with knowledge of his status as a member of the plaintiff class in a pending class action lawsuit containing all the attendant procedural protections designed to ensure that only a fair and adequate settlement judgment would be entered by the court, Holbrook purposefully availed himself of the privilege of having the Delaware Court of Chancery finally, and in a single lawsuit, determine the adequacy of the settlement agreement, 'thus invoking the benefits and protections of its laws.' *Hanson v. Denckla*, 357 U.S. 235, 238, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).
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> "[6] The state of Delaware is the situs of ownership of all stock in Delaware corporations. Del. Code. Ann. tit. 8, § 169 (1991)."

17 F. 3d at 1559-60.

A detailed record was built in this case of the acts taken by each former stockholder who is a plaintiff here in response to the notices sent them in *Hynson*.[9] Several of the plaintiffs here were also plaintiffs in *Neal*, having held some of their stock for an

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[9] The Third Circuit relied on Holbrook's tender of his shares as the additional element establishing the necessary contacts. Here, all of the plaintiffs either tendered their stock in response to the tender offer or surrendered them in the merger. They argue that these acts did not establish sufficient contacts with Delaware, however, because the tendering shareholders were to deliver a letter of transmittal either by mail to New Jersey or by hand in New York. Alternatively, the shares could be transferred by book entry in New York. None of this, they say, established sufficient contacts with Delaware. The defendants do not respond to this argument, so we do not rely on the tender as establishing the necessary contacts.

appraisal after either tendering some of it in response to the tender offer or surrendering some of it in the merger. Thus, they purposefully availed themselves of the benefits of the law of Delaware by invoking its statutory appraisal procedure as to part of their stock. Others among the plaintiffs, principally the AmSouth trusts, filed proofs of claims in *Hynson*. They counter Drummond's argument on this point by noting that they were members of the class without having filed such proofs of claims and arguing that their filings were therefore insignificant, but we deem them significant as showing an intent to submit to the jurisdiction of the *Hynson* court. A much larger number of the plaintiffs here returned W-9 forms, by which they prevented "backup withholding" of federal income tax from their settlement proceeds. Again, the plaintiffs contend that the returning of these forms was inconsequential to the Delaware court's jurisdiction, but again we disagree. The plaintiffs, by returning these forms, expressed an interest in receiving proceeds from the *Hynson* settlement—indeed, they affirmatively indicated they wanted to receive 100% of those proceeds, not just 80%.

VII.

Significantly, the Supreme Court of Delaware had provided, before *Hynson* was filed, a mechanism whereby a right to opt out may be provided even if the chancery court certifies the action as a Rule 23(b)(2) action. That court held, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), that an action for both injunctive and monetary relief may be certified as a (b)(2) action, provided that monetary relief is not the predominant remedy.

> "The Court of Chancery found that although the Dana complaint contained an alternative prayer for damages, the *primary* relief sought and *obtained* in the Settlement was declaratory, injunctive and rescissory. Thus, the Court of Chancery found that the Dana action satisfied the second (b)(2) requirement of *primarily* seeking similar equitable relief with respect to

> the class as a whole. ... We are satisfied that both of these conclusions are supported by the record. We affirm the decision of the Court of Chancery to certify the Dana action pursuant to subsection (b)(2) of Chancery Court Rule 23."

564 A.2d at 1096-97 (emphasis in original; citations and footnotes omitted). The court proceeded to hold that, in such a case, a chancery court could, in its discretion, allow a member of the class to opt out:

> "We have concluded that when a portion of the relief which is sought is monetary, a member of a class certified under rule 23(b)(2) has a Constitutional due process right to notification[28] but not a right to opt out of the class. . . . Nevertheless, the Court of Chancery has discretionary power, under its Rule 23(d)(2)[,] to provide for an opt out right and to require that notice thereof be given, if it believes that an opt out right is necessary to protect the interest of absent class members. ... In exercising its discretion, before deciding whether or not to extend an opt out privilege as part of a subsection (b)(2) certification, the Court of Chancery must balance the equities of the defendants' desire to resolve all claims in a single proceeding against the individuals' interest in having their own day in Court. The ability to opt out of the class always involves the potential for a multiplicity of lawsuits and variations in adjudication which class actions are intended to prevent.
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"[28] The right to notification affords the absent class member an opportunity to ask the court to afford it a right to opt out of the Rule 23(b)(2) class if such a right was not provided for in the notice. *See* [Fed.R. Civ.P. 23 Advisory Committee's Note (1966), *reprinted in* 39 F.R.D. 95 (1966)], at 106-07. In this case, Nottingham was able to make such an argument. Moreover,

> since it was notified of the proposed Settlement, prior to the class certification, in addition to objecting to the Settlement, Nottingham was able to argue the merits of the decision to certify the Dana action under subsection (b)(2) instead of subsection (b)(3)."

564 A.2d at 1101 (citations and other footnotes omitted). The Supreme Court of Delaware held that the Court of Chancery did not abuse its discretion in its decision "not to afford Nottingham the right to opt out of the Dana class action." *Id.*

The Supreme Court of Delaware has thus provided a vehicle for challenging a non-opt-out certification and for obtaining a discretionary exclusion, of which these plaintiffs did not avail themselves. If any of the plaintiffs here had challenged Chancellor Allen's order on appeal, the Supreme Court of Delaware might well have reversed on the authority of *Nottingham Partners*. Instead, most of these plaintiffs affirmatively indicated their willingness to participate in the *Hynson* settlement. Many of them returned W-9 forms to avoid backup withholding of federal income tax from the settlement proceeds they were to receive. Others filed proof of claim forms. All of them received notice by first class mail, but none of them objected to the settlement. The majority of these plaintiffs are sophisticated investors, and virtually all the rest of them had the benefit of the efforts on their behalf undertaken by the Shareholders' Protective Committee in response to Drummond's 1983 merger attempt. Under these circumstances, we cannot say that these plaintiffs were deprived of notice and an opportunity to be heard or that the procedures in the Delaware court fell so far short of "fairly insur[ing] the protection of the interests," *Hansberry v. Lee*, 311 U.S. at 42, of the absent class members as to make it unnecessary to request in the Delaware court that they be excluded from the action.

VIII.

We are not sure how far *Shutts* and *Shaffer* reach in this situation; indeed, the United States Supreme Court, as we read

Ticor, seems unsure of the reach of *Shutts*. Clearly, *Shutts* requires, in a class action for monetary damages, opt-out rights for class members who do not have sufficient contacts with the class action forum.[10] Just as clearly, *Shaffer* disallows the exercise of jurisdiction *quasi in rem* when the property is unrelated to the cause of action and the defendant does not have sufficient contacts with the forum. However, *Shaffer* is unclear as to whether the ownership of stock in a corporation incorporated in the forum state would support jurisdiction over the owner in an action alleging deprivation of rights arising out of that ownership. Even if it would not always support such an exercise of specific jurisdiction, we, like the Third Circuit in *Grimes*, hold that the plaintiffs' stock ownership, together with their activities indicating a willingness to participate in the settlement, established the necessary contacts and made it fair and reasonable under all of the circumstances for the class action court to exercise jurisdiction over their claims.

IX.

The foregoing discussion sets forth our conclusion that the plaintiffs in these present cases who had sufficient contacts with Delaware in connection with the *Hynson* proceedings are barred from relitigating the claims settled in *Hynson*. This answers the

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[10] We have examined numerous cases, treatises, and authorities applying or discussing *Shutts*, and we find none inconsistent with the result we reach here. *See, e.g., Brown v. Ticor Title Ins. Co.*, 982 F. 2d 386 (9th Cir. 1992), cert. dismissed, *Ticor Title Ins. Co. v. Brown*, ___ U.S. ___, ___, 114 S. Ct. 1359 (1994); *In re Real Estate & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989); *Colt Industries Shareholders Litig.*, 77 N.Y.2d 185, 566 N.E.2d 1160 (1991); *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993); 1 H. Newberg and A. Conte, *Newberg on Class Actions*, §§ 1.14-1.23 (3d ed. 1992); 7A Wright, Miller, and Kane, *Federal Practice and Procedure: Civil*, § 1757 (2d ed. 1986); 7B *Id.*, § 1789; A. Miller and D. Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1 (1986).

claims of most of the plaintiffs, and it may answer the claims of all plaintiffs. However, we are left with the possibility of remanding the cause for individualized findings as to any plaintiffs who may not have established any contacts with Delaware other than the holding of ABC stock. Under the facts and circumstances of this case, we do not find it necessary for such individualized determinations.[11]

Some constitutional rights may be waived if not timely asserted.

> "[A] failure to assert constitutional rights at the appropriate time and place constitutes a waiver of those rights. *City of Huntsville v. Gudenrath*, 194 Ala. 568, 69 So. 629; *City of Birmingham v. Wills*, 178 Ala. 198, 59 So. 173; *City of Mobile v. Smith*, 223 Ala. 480, 136 So. 851. It was stated by the Court in *Vernon v. State*, 240 Ala. 577, 200 So. 560, cert. den., *Vernon v. Wilson*, 313 U.S. 559, 61 S.Ct. 837, 85 L.Ed. 1519:
>
> > "'So also, * * * one may waive and does waive his constitutional rights if he fails to assert or claim them at the appropriate time and place and according to the established course of procedure.'

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[11] The plaintiffs correctly point out that a "minimum contacts" test for whether an absent class plaintiff who was not allowed opt-out rights can collaterally attack the judgment will lead to uncertainty in class settlements. However, with *Shutts* as the dispositive law on point, the only alternative would be to say that, in any plaintiffs' class action for monetary damages, if no opt out rights were given, *all* absent class plaintiffs (except, presumably, those who have accepted settlement proceeds and signed releases) can collaterally attack the judgment. If the *Shutts* rule is not a matter of *in personam* jurisdiction, it seems that residents of the forum state and others with ample contacts would not be bound by a class judgment unless they were expressly given the right to opt out. We decline to hold that due process requires such a broad right of collateral attack regardless of contacts with the forum and regardless of other protections that were given the absent class members.

> "In *Alabama Cartage Co., Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen*, 250 Ala. 372, 34 So. 2d 576, 2 A.L.R.2d 1273, the following statement of the rule of waiver was approved:
>
> > "'"A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and, having once done so, he cannot subsequently invoke its protection."'"

Barnes v. State ex rel. Ferguson, 274 Ala. 705, 711, 151 So. 2d 619, 624 (1963).

An objection based on a lack of jurisdiction over the person may be waived by appearing and not contesting the court's jurisdiction. Rule 12(h)(1), Ala. R. Civ. P., provides:

> "A defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. . . ."

See 2A *Moore's Federal Practice*, ¶ 12.23 (2d ed. 1991). See also Rule 12(b)(2), motion raising defense of lack of jurisdiction over the person, and Rule 12(g), consolidation of defenses in motion. This rule, of course, is stated in regard to a defendant, as to whom the question of *in personam* jurisdiction is ordinarily presented. It does not apply neatly to an assertion by a person who was an absent member of a previously pending class action, because it is not ordinarily contemplated that absent class members will enter appearances or raise "defenses" of lack of jurisdiction over the person. However, we conclude that any objec-

tions by any of the present plaintiffs to the *Hynson* court's jurisdiction over them have been waived, for the following reasons: all of the absent *Hynson* class members received notice of the action and of the pending settlement; the *Hynson* court had at least colorable jurisdiction over the absent class plaintiffs, because they were stockholders of the corporation whose stock was the subject of the class action; Delaware, as stated in *Nottingham Partners*, provided a discretionary right to opt out even of class actions certified under Rule 23(b)(1) or (b)(2); and none of the absent class members in *Hynson* expressed any objection to the settlement or any interest in exclusion from the action until long after it was settled and after an independent but related appraisal action reflected a higher value than the settlement gave. The interest of these plaintiffs in opting out of *Hynson* arose only after the much higher stock valuation of *Neal* gave them, in hindsight, a dissatisfaction with the *Hynson* settlement. Thus, we hold that, in the circumstances of this case, the doctrine of *res judicata* bars the plaintiffs' relitigation of the claims that were settled in *Hynson*.

For the foregoing reasons, we conclude that the judgment in *Hynson* is binding on the plaintiffs. The summary judgment is due to be affirmed.

AFFIRMED.

Maddox, Shores, Cook, and Butts,* JJ., concur.

RELEASED
JULY 7, 1995
CLERK
SUPREME COURT OF ALABAMA

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*Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

APPENDIX D

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

Civil Action No. CV 91 043

JOHN H. MARTIN, et al
Plaintiffs

vs

DRUMMOND COMPANY, INC., et al
Defendants

ORDER

This action is submitted on various motions for summary judgments or partial summary judgments and is submitted on argument and briefs of counsel and voluminous documents, depositions, letters and materials. A small forest has contributed its life to this litigation.

A synopsis of this action, as this court sees it, is as follows:

The Alabama By-Products Corporation was a corporation, primarily locally owned, in the business of mining and selling coal and production of coke and possibly other by products. In 1977-78, Drummond purchased the controlling share of the voting stock of ABC. This share represented some 68% of the voting shares of stock. There was some litigation filed in 1978 concerning Drummond and ABC or shareholders which apparently has no bearing on this litigation, but is only material to show the beginning of apparent strained business relationships between Drummond and some of the remaining shareholders. From the time of the initial purchase of stock by Drummond, it was known generally that it was Drummond's desire and purpose to eventually own all the shares of ABC. In the early 1980's, there were many rumors about ABC and Drummond.

Depositions reveal it was common talk in the business and social circles of the Jefferson County area, board members were replaced and officers were changed or replaced.

In March, 1983, Drummond proposed a merger at $65.00 per share which was withdrawn in September, 1983, apparently because the fairness opinion obtained by ABC from Kidder Peabody was not favorable. At about this point of time a Stockholders' Protective Committee was formed by Wyatt R. Haskell, James L. Hendrix, and Henry S. Lynn. The Stockholders Protective Committee (SPC) obtained a list of minority stockholders and sent to each a letter stating the situation, as they [sic] observed it, requesting a donation of twenty cents (.20) a share to finance the defeat of the merger at $65.00 per share and advised [sic] that the assets and resources of ABC were undervalued, and pension fund overfunded and the shares of stock were, in their opinion, worth in excess of $100.00 per share. The SPC examined the books of ABC and hired experts to advise them as to their opinion as to values of ABC. Numerous reports of their findings, values and opinions were sent to the certain shareholders of ABC.

On December 5, 1984, Drummond initiated a Tender Offer of $75.00 per share for any and all outstanding shares of stock of ABC. It appears that Drummond acquired over 90% of the voting stock in the next four or five weeks. In a matter of days after the Tender Offer an action was filed in the U.S. District Court for the Northern Division of Alabama, *Turner, et al, vs. Drummond, et al,* alleging violation of the Securities Exchange Commission rules along with fraud, coercion and breach of fiduciaru [sic] relationship of majority to minority shareholders of stock (these will be referred to as unfair practices). This action was later dismissed by the Federal Court in that the non-tendering shareholders' [sic] plaintiffs had no standing to bring the action. On January 4, 1985, an action was filed in the Chancery Court of Delaware by Richard Hynson, Jr. (*Hynson vs.*

Drummond Coal Company, et al) challenging the Tender Officer [sic] alleging unfair practices, that ABC Directors had breached their fiduciary duties to ABC stockholders, that the Tender Offer was Coercive [sic] and the offering pamphlet was false and misleading. Hynson sought to enjoin the Tender Offer or rescind it and sought an accounting and asked for compensatory and/or rescissory damages. This action was sought to be certified as a class action for Class "A [sic] and "B" stockholders of ABC under Rule 23(b)(2).

On December 3, 1985, Phil Neal, Jr., and others who had not tendered their shares, filed in the Chancery Court of Delaware an action (*Neal, et al, vs Alabama By-Products, et al*) for a judicial appraisal of the fair value of their stock. This complaint alleged "unfair practices" along with the aspect seeking judicial appraisal. The *Neal* case was tried and the Vice Chancellor ruled the fair value of each share was $180.67. The Delaware Court also ruled that the statutory appraisal action could not be enlarged to include claims for fraud and breach of fiduciary duty and this aspect of claim for relief was denied.

The *Hynson* case, after discovery and negotiations, was settled for five million dollars and certified as a class action pursuant to Rule 23(b)(1) and (2). The Delaware Court gave notice of settlement to the class. The notice of settlement did not provide the members of the class the right to "opt out" of the class. No members of the class appeared or opposed the settlement. Further Drummond petitioned the Delaware Court to have a "fairness hearing' [sic] to determine the constitutionality of the *Hynson* settlement. Notice was sent to the class and on hearing date no one appeared or interjected any objection or disapproval of the settlement but one attorney for a group of plaintiffs in this action advised the Delaware Court that his position was that the Delaware Court did not have jurisdiction over the Alabama resident shareholders. The Delaware Court, in a long, well reasoned, opinion determined that a right to "opt out" was not

constitutionally required in the *Hynson* case and held the settlement was fair and free from fraud. The Delaware Court held, in my opinion, that if one holds, buys or acquires stock in a corporation domiciled in a separate state from his residence, this subjects that person to the foreign state's processes to the limited extent necessary to adjudicate their rights as stockholders against the corporation's directors and controlling stockholders and that Delaware had jurisdiction over the class in *Hynson*. Further [sic] that the case of *Phillips Petroleum Co. vs Shutts, 472 U.S. 297,* was "limited to those class actions concerning claims wholly or predominately for money judgments. We (the Supreme Court) intimate no view concerning other types of actions, such as those seeking equitable relief" and that *Hynson* was filed as an equitable action and the fact that it was later settled monetarily does not alter its equitable nature and the constitutional right to opt out of the class as declared in *Shutts* does not apply.

On January 8, 1991, John Martin filed the case, sub judice, which has been joined by several hundred other plaintiffs, alleging "unfair practices" by defendants. In this action, the defendants attempted to have this court enforce the *Hynson* judgment. The plaintiffs argued to the court that due to the failure of *Hynson* to provide for the right to allow a shareholder to "opt out" of the class that *Shutts* applied. The previous judge of this court, presiding over this case, ruled that the plaintiff [sic] are not barred by the Delaware judgment in *Hynson* and that the *Hynson* judgment is void. This was a judgment for a partial summary judgment. This judgment was appealed to the Alabama Supreme Court which dismissed the appeal as not being an appealable order.

The judge originally assigned this case recused himself and this action was reassigned to me. It is now before me on the various motions for summary judgment or partial summary judgment.

Firstly, the defendants move the court to reconsider the previous order of this court's [sic] ruling that the *Hynson* judgment of the Delaware court is unenforceable and void. The plaintiffs strenuously object to reconsideration of this court's previous ruling on *Hynson* and in argument says [sic] that *Hynson* is substantively void, but not procedurally void so as to toll running of the statute of limitations.

In regard to the court's ruling and order of December 11, 1991, concerning *Hynson*, I reach a different conclusion. The *Hynson* case was an equitable action filed in the Chancery Court of Delaware. The Delaware Court could have granted equitable relief if the matter had been fully litigated. The Delaware Court gave adequate notice and right to be heard to absent class members. No member of the class objected or appeared and only one notified the court that the court (Del.) had no jurisdiction over absent class members living in Alabama. The requirement of the right to "opt out" as provided in *Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985)* is not present under these facts and proceedings and said settlement and judgment of the Delaware Court in *Hynson*, in my opinion, is binding on all parties. For it is my opinion that *Hynson* is valid and binding or that the statute of limitations has run on the plaintiffs [sic].

As one plaintiff's brief characterized this action as "The Sting," the plaintiffs' approach can be looked at as how to have your cake and eat it too. The plaintiffs prevailed upon this court to rule the *Hynson* case void, but attempts [sic] to use it to toll the statute of limitations. A void judgment is one where the court lacks jurisdiction over the subject matter or over the parties. A void judgment is one which, from its inception, is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind the parties or to support a right, of no legal force and effect whatever, and incapable of enforcement in any manner or to any degree. *Loyal v. Dir., Dept. of Public Safety, 480 So. 2d 577.* A void judgment is in legal effect no judgment. By it no

rights are devised. From it no rights can be obtained, it being worthless in itself. All proceedings founded upon it are equally worthless. It neither binds nor bars anyone. If my opinion of *Hynson* is in error, the the [sic] limitations of time, two years, has long expired one [sic] bringing this action. Our Supreme Court has held that the filing of a class action tolls the Statute of Limitations until the class is decertified or an independent action is filed. The class action, *Hynson*, was never decertified, in fact it was certified and affirmed, but an independent action, *Neal*, was filed in December, 1985, which triggered the running of the statute of limitations in itself.

In regard to the allegations of this action concerning the Tender Offer pamphlet, the court does not find substantial evidence of fraud. As stated in the *Neal* case, "Value, as beauty, is in the eyes of the beholder." There are various ways and theories in which to arrive at estimations of value, some are beneficial to a seller and some are beneficial to a buyer. As shown in *Neal*, the estimation of value in multimillion dollar corporations may be greatly diverse. The statements in the pamphlet concerning the possible actions in the event over 90% of the stock was acquired merely advised the shareholders of legal possible actions in [sic] event certain thresholds occurred. It could not be coercive, only advisory, and possibly have been fraudulent if not included. As to the argument that the statement in the pamphlet in substance "We believe this is a fair officer" [sic] as being fraudulent will not support an action for fraud. There is a clear distinction between belief and positive knowledge. A person may honestly believe a thing and yet not know it. The word "believe" used in this context is no more than an opinion as to value and not actionable as a fraudulent statement of material fact.

This court takes notice of the various strategies used by the various shareholders, some tendered, some tendered part of their shares and retained part of their shares, some retained all, some

tendered part of their shares and had others judicially evaluated, some had share [sic] evaluated and surrendered others in the eventual "squeeze out." The court finds that the plaintiffs that "split;" that is, retained or tendered some shares while having others judicially evaluated have violated the prohibition against splitting a cause of action. *Terrell v. City of Bessemer, 406 So.2d. 337; Johnson v. Brown Service Ins. Co., 293 Ala. 549, 307 so.2d 518.*

The court further finds the "Tender Offer' [sic] was an arms length transaction. A Tender Offer is a voluntary transaction. In this matter the plaintiffs, even before the Tender Offer was made, considered the pros and cons of said offer, they contacted attorneys and stock brokers, the SPC reported to them, some had committees evaluate the offer, in all, the plaintiffs made considered business judgments, whether good or bad from their viewpoint, they fail to state a claim against these defendants. Apparently, an independent fairness opinion was not necessary as Martin's brief states: "Drummond orchestrated a Tender Offer so as to avoid having to obtain a fairness opinion from an independent Banker." Apparently, a fairness opinion would be necessary in a merger.

For these and other valid reason, this court is of the opinion defendants are entitled, by law, to a summary judgment and that motions by plaintiffs for partial summary judgment on the Statute of Limitations and to assess the value of stock at $180.67 per share are to be denied.

It is, therefore, ORDERED and ADJUDGED by the court that a summary judgment be, and it hereby is, entered in favor of the defendants and against the plaintiffs and this action be, and it is hereby is, dismissed with each party to bear its own costs. There being no reason for delay in entry of this judgment, this judgment for defendants is entered under Rule 54(b), ARCP, and this action be, and it hereby is, dismissed. It is further ORDERED

and ADJUDGED by the court that plaintiffs' motions for partial summary judgment be, and they hereby are, overruled and denied.

DONE and ORDERED this 2nd day of September, 1993.

/s/ Robert M. Parker
Circuit Judge